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No. 96-2054

In the Supreme Court of the United States

OCTOBER TERM, 1996

EAST COLUMBIA BASIN IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioner's tort action arising from property damage sustained as a result of allegedly negligent construction and repair of an irrigation canal that is part of a multi-purpose federal flood control project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 105 F.3d 517. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1997. A petition for rehearing was denied on April 8, 1997. Pet. App. 11a-12a. The petition for a writ of certiorari was filed on June 26, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the East Columbia Basin Irrigation District, manages irrigation works that are part of the Columbia Basin Project, a multi-purpose water project constructed by the United States to serve irrigation, hydroelectric power generation, flood control, and navigation functions. Pet. App. 4a. All of those purposes are accomplished by retention of waters behind the Grand Coulee Dam and their controlled release. *Ibid.* The level of water in Franklin D. Roosevelt Lake behind that dam is regulated for flood-control and irrigation purposes; that lake, in turn, is the source of the water that flows through the East Low Canal, an irrigation channel that is managed by petitioner. Pet. App. 18a. In 1992, a retaining wall of the East Low Canal burst, causing flooding and other property damage in the region around Moses Lake, Washington. *Id.* at 5a.

2. Petitioner brought this action against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the Eastern District of Washington, alleging that the canal's rupture was the result of its negligent construction and repair by the federal government. Pet. App. 14a. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the United States moved to dismiss the complaint for failure to state a claim, or alternatively, for summary judgment, arguing, *inter alia*, that the United States is immune from liability under the Flood Control Act of 1928, 33 U.S.C. 702a *et seq.* Section 702c provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

The district court granted the government's motion to dismiss. Pet. App. 22a. The district court observed that this Court in *United States* v. *James*, 478 U.S. 597 (1986), had broadly interpreted the immunity under Section 702c for federal flood control activities. The district court held that because flood control was "a significant purpose" (Pet. App. 17a) behind the creation of the Columbia Basin Project and because "the water damage at issue here clearly meets the definition of 'flood' for purposes of" Section 720c, the immunity established by that section applied even though the water that caused the canal break here was intended solely for irrigation, *id.* at 18a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court concluded that "the waters that spilled from the East Low Canal were 'flood waters.'" *Id.* at 7a. The court further determined that the statutes authorizing construction of the Columbia Basin Project, their legislative history, and the record here, showed that flood control was one of the project's purposes. *Id.* at 7a-8a. The Ninth Circuit rejected petitioner's invitation to treat the East Low Canal as a separate facility for purposes of applying Section 702c, relying on its own earlier decision in *Morici Corp.* v. *United States*, 681 F.2d 645 (1982). Pet. App. 8a-9a.[1] Because the Columbia Basin Project as a whole served a flood control purpose and because the events giving rise to this action therefore were "not

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[1] In *Morici*, the court upheld the government's claim of immunity in a suit brought by landowners who alleged that flooding caused by a federal project had damaged their crops. The court rejected a contention that the particular purpose served by the release of water was relevant in deciding the government's immunity in the context of a multi-purpose project. See 681 F.2d at 648.

wholly unrelated to the project," the court held that federal liability was precluded by Section 702c. *Id.* at 9a.

The court of appeals specifically rejected petitioner's contentions that application of Section 702c immunity should depend on the proportion of the project's total costs allocated to flood control, or on the timing of federal flood control expenditures. Pet. App. 9a. The court concluded that Congress's inclusion of flood control among the Columbia Basin Project's purposes was dispositive, and that no inquiry into whether specific flood control efforts "contributed to the flood" was necessary. *Ibid.*

ARGUMENT

1. When Congress embarked upon a multi-decade program to construct dams and other structures for flood control in 1928, one of the issues it faced was the scope of the federal government's immunity from liability for damages resulting from its flood control activities. Congress limited the government's financial exposure by including in the 1928 legislation a provision that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." 33 U.S.C. 702c.

This Court broadly construed the scope of that immunity in *United States* v. *James*, 478 U.S. 597 (1986), holding that it extends both to property damage and to personal injury. *Id.* at 605. The Court interpreted the terms "'flood' and 'flood waters'" to apply to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *Ibid.* The "sweeping lan-

guage" of Section 702c and the "equally broad and emphatic language" of its legislative history supported recognition of a broad immunity in the United States. *Id.* at 608. Accordingly, the Court concluded, "the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning." *Ibid.*

a. Contrary to petitioner's submission, the issue on which it seeks plenary review has not been the subject of numerous, conflicting court of appeals' decisions. The issue raised in this case is whether a multi-purpose project may be subdivided into different parts, some of which enjoy Section 702c immunity and some of which do not. Petitioner complains (Pet. 10) that the Ninth Circuit erroneously focused its funding inquiry on the Columbia Basin Project as a whole, and not on the particular component of it that failed. But the court of appeals' conclusion is entirely appropriate in the context of a large, multi-purpose water project in which the various functions are interrelated. Indeed, the district court found the East Low Canal to be "an integral part" of the Columbia Basin Project as a whole, Pet. App. 21a, and that flood control was one of the Project's purposes, *id.* at 4a, 19a. Other than the Ninth Circuit in this case and in *Morici Corp.*, no other court of appeals has addressed whether the United States' immunity may be denied for damage caused within a sub-part of a multi-purpose flood control project. Rather, the cases on which petitioner relies concern whether the plaintiff's injury was caused by a flood-related activity of a flood control project. Because no circuit conflict

exists on the narrow issue before this Court, review is not warranted.[2]

b. This case involves property damage caused directly by water escaping from a federal flood control project. It thus lies squarely within the plain language of Section 702c and the decision in *James*. The statute provides immunity for "any damage *from or by* floods or flood waters at any place." 33 U.S.C. 702c (emphasis added). This Court made clear in *James* that "floods" and "flood waters" include "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, *as well as * * * waters that such projects cannot control*." 478 U.S. at 605 (emphasis added). Property damage caused by waters escaping through a ruptured retaining wall that is part of a federal flood control project is explicitly covered by the language of the statute. Moreover, protection of the United States from liability for flooding of land caused by the

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[2] Apart from the Ninth Circuit, which is the only circuit that has addressed the issue of immunity within sub-parts of a multi-faceted project, only one other court of appeals since *James* has addressed another issue somewhat related to the one raised by this case—whether a project is in fact a flood control project. In *Williams* v. *United States*, 957 F.2d 742 (10th Cir. 1992), the court considered the "threshold question" of whether the project was a "flood control project." *Id.* at 743. Relying on a government affidavit stating that the project had no "flood control capabilities," the court concluded that it was not a flood control project. *Id.* at 744-745. The court reasoned that the authorizing statute did not compel a different result, since it described the project to be built for "navigation *or* flood control." *Id.* at 744. Accordingly, the court's decision was based on an issue of fact and not a principle of law that may be said to conflict with the approach of the court below in this case.

alleged construction failures of a federal flood control project was central to Congress's concern in creating an immunity for federal flood control activities. See *James*, 478 U.S. at 606-608; see also *id.* at 617 (Stevens, J., dissenting) (arguing that the immunity under Section 702c should extend *only* to "overflow damage to land"). Nothing in this Court's decision in *James* supports petitioner's contention that an entire project, one of whose purposes is flood control, may be sub-divided into parts that would not be immune from liability for damage caused by flood waters. Nor do the recreational personal injury cases cited by petitioner support such a result.[3]

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[3] At least eleven cases involving personal injuries on or in federal flood control lakes have held that the United States is immune from suit. See *Reese* v. *South Florida Water Management Dist.*, 59 F.3d 1128 (11th Cir. 1995) (holding government immune from claim involving recreational boating accident at federal flood control lake); *Boudreau* v. *United States*, 53 F.3d 81 (5th Cir. 1995) (injury to recreational boater during Coast Guard rescue), cert. denied, 116 S. Ct. 771 (1996); *Fisher* v. *United States Army Corps of Engineers*, 31 F.3d 683 (8th Cir. 1994) (recreational diving accident); *Thomas* v. *United States*, 959 F.2d 232 (4th Cir. 1992) (Table) (recreational diving accident); *Zavadil* v. *United States*, 908 F.2d 334 (8th Cir. 1990) (per curiam) (recreational diving accident), cert. denied, 498 U.S. 1108 (1991); *Hiersche* v. *United States*, 933 F.2d 1014 (9th Cir. 1991) (Table) (accident involving professional diver inspecting dam's underwater fish screens), cert. denied, 503 U.S. 923 (1992); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.) (recreational diving accident), cert. denied, 498 U.S. 920 (1990); *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990) (recreational swimming accident); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989) (diving accident), cert. denied, 494 U.S. 1016 (1990); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989) (swimming accident); *McCarthy* v. *United States*, 850 F.2d 558 (9th Cir. 1988)

c. Even if this case squarely presented the issue on which petitioner asserts there is a circuit conflict, the Ninth Circuit's decision here would not warrant further review. Petitioner characterizes the post-*James* decisions as creating a "cavernous split" (Pet. 6) between those adopting the Ninth Circuit's "wholly unrelated to flood control" test and others requiring "some sort of nexus" between government flood control activities and the plaintiff's injuries. Pet. 7. Both approaches, however, require a connection between the government's management of flood waters and the injury in question. Any difference concerns only how substantial that nexus must be.

In practical application, moreover, the difference between the formulations is not always easy to discern. For example, the Third Circuit (a "wholly unrelated" jurisdiction) has suggested that an injury

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(diving accident), cert. denied, 489 U.S. 1052 (1989); see also *Holt* v. *United States*, 46 F.3d 1000 (10th Cir. 1995) (government immune from suit where mist from water released from dam created ice slick on adjacent road).

Four cases have rejected the United States' immunity defense. Those cases have involved activities unrelated to the project's flood control functions or waters found not to be "flood waters" within the meaning of Section 702c. See *Cantrell* v. *United States*, 89 F.3d 268 (6th Cir. 1996) (no immunity from claim by recreational boater injured in Coast Guard rescue); *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity from claim by wade fisherman); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity from claim by snorkeler struck by boat); *E. Ritter & Co.* v. *Department of the Army*, 874 F.2d 1236 (8th Cir. 1989) (no immunity for erosion caused by rain waters that had not yet reached flood control project). In none of those cases did an issue arise as to whether some subpart of the project could be distinguished for purposes of conferring immunity.

may be "wholly unrelated" to flood control if waters contained by the flood control project are not "a substantial factor in [causing] injuries." *Dawson*, 894 F.2d at 74 (citing *McCarthy*, 850 F.2d at 561-562). See also *Bailey* v. *United States*, 35 F.3d 1118, 1121 (7th Cir. 1994) (noting that "in practice, the Eighth Circuit's 'substantial factor' analysis operates much like the 'wholly unrelated' inquiry as applied by the Third Circuit in *Dawson*"). The two approaches thus have produced similar results. Compare, *e.g.*, *McCarthy* v. *United States*, 850 F.2d at 562 (holding government immune under "wholly unrelated" test from claim by swimmer injured by dive into shallow water of federal flood control project); *Dewitt*, 878 F.2d at 247 (same result on similar facts under "substantial factor" test); *Fryman* v. *United States*, 901 F.2d at 82 (same result on similar facts in opinion questioning "wholly unrelated" test and suggesting flood control activities must "increase the probability" of injury to support immunity). Where no sufficient nexus on particular facts is demonstrated, courts have rejected the defense. See *Henderson* v. *United States*, 965 F.2d 1488 (8th Cir. 1992) (no immunity in death of fisherman where drowning was caused by release of water, at direction of private power company, from dam operated solely for hydroelectric power generation); *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989) (no immunity for alleged negligent failure to warn swimmers of hazard from boats, in death of snorkeler struck by privately operated power boat at flood control lake).[4]

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[4] Only the Sixth Circuit has departed from this fact-specific inquiry into the causal connection between the particular injury involved and federal flood control activities, requiring

The linguistic differences among the circuits on which petitioner relies, therefore, have not produced any fundamentally different outcomes in cases. Indeed, petitioner does not argue that this case would have been decided differently under any other circuit's approach. Instead, without any citation of supporting authority, petitioner advances a new approach for determining when the United States is protected by statutory immunity. See Pet. 11. For that reason, and because petitioner essentially acknowledges that the Ninth Circuit's decision in this case simply applied circuit precedent and made no change to existing law (see Pet. 6), petitioner offers no persuasive reason for the Court to grant review—especially since this Court has denied petitions for writs of certiorari raising the nexus issue in recent Terms.[5]

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instead a connection between federal flood control efforts and the alleged tortious conduct to support immunity under Section 702c. See *Cantrell*, 89 F.3d at 273 (no immunity where alleged tort—negligent piloting of Coast Guard rescue boat on flood control lake—was unrelated to federal flood control efforts). But petitioner does not advocate the Sixth Circuit's approach (see Pet. 9), nor does petitioner contend that *Cantrell* creates a conflict that this Court need address. In any event, the actual construction of the entire project, and any negligence in doing so, would appear to meet the Sixth Circuit's test. Thus, the immunity claim raised by the United States in this case would also be upheld under that circuit's approach.

[5] Petitioner asserts that the Ninth Circuit here "widens" a split by "clinging" to its earlier position. *Ibid.* Indeed, the Ninth Circuit was the first appellate court to apply Section 702c after this Court's decision in *James*. In *McCarthy*, 850 F.2d at 562-563, the Ninth Circuit reaffirmed the "wholly unrelated" test that it had initially articulated prior to *James* (see *Morici Corp.* v. *United States*, 681 F.2d at 648). This Court denied petitions for writs of certiorari in *McCarthy* itself

2. Petitioner asserts that "[a]t no time" prior to construction of the East Low Canal were any federal funds "ever expended for flood control on the entire Columbia Basin Project." Pet. 4. The court of appeals rejected that assertion (see Pet. App. 5a), and this Court should not accept petitioner's invitation to review what, in essence, is an issue of fact that petitioner apparently disputes.[6] In any event, public documents unequivocally demonstrate that federal funds were allocated to flood control in the Columbia Basin Project well before the construction of the East Low Canal in the early 1950s. See H.R. Doc. No. 172, 79th Cong., 1st Sess. 9 (1947) (allocating $1 million of the cost of the Columbia Basin Project to flood control and navigation).

Moreover, there is no support in the statutory language, the legislative history, or this Court's cases, for petitioner's contention that the availability of immunity under Section 702c depends on the timing of federal flood control expenditures in relation to the governmental conduct alleged to have caused the damage at issue. Requiring that such expenditures predate the alleged negligence would in many cases make the immunity inapplicable despite large federal flood control expenditures. In this case, where the government's alleged negligence was in the initial construction of the project and its repair shortly thereafter, petitioner's timing rule would deny the federal

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and in five subsequent cases from the Ninth and three other circuits. See note 3, *supra*.

[6] Likewise, petitioner's suggestion that this Court could "take judicial notice" (Pet. 10) of petitioner's version of the facts is contrary to the traditional rule that this Court will not disturb the findings of fact made by the courts below. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

government its statutory immunity irrespective of the amount of subsequent flood control expenditure during the project's decades of continuing operation. In particular, petitioner's theory would require the courts to ignore that, for the year in which the canal wall broke in this case (1992), Congress allocated over $49 million to flood control functions of the Columbia Basin Project. See *Energy and Water Development Appropriations For 1992: Hearings Before a Subcomm. on Energy and Water Development of the House Comm. on Appropriations*, 102d Cong., 1st Sess., Pt. 3, at 648 (1991). There is no basis for petitioner's contention that spending for flood control that occurs after the alleged negligence is irrelevant to Section 702c's application.

Finally, petitioner asserts (Pet. 10) that the Ninth Circuit misapplied its own "wholly unrelated" test because the spending on flood control in the Columbia Basin Project was "trivial" when compared to expenditures for other project purposes such as hydroelectric power generation, navigation, and irrigation. Petitioner thus suggests that courts applying Section 702c should assess on a case-by-case basis whether expenditures for flood control for the project at issue were significant enough to warrant the government's immunity. Not only is there no indication in Section 702c itself that Congress intended for the courts to engage in such an analysis, the absence of any standards for making that assessment could spawn needless litigation over the government's entitlement to immunity from liability. The specific standard advocated by petitioner—that flood control expenditures be "roughly commensurate" with expenditures for other project purposes in order to support application of Section 702c (Pet. 11)—finds no support

in the language of the statute or in its purpose of providing broad protection for federal flood control activities (see *James*, 478 U.S. at 608). Given the enormous size of multi-purpose water projects such as the Columbia Basin Project, and the huge costs of building and operating them, petitioner's rule would mean that tens of millions of dollars could be allocated to flood control in such a project and yet Section 702c would provide the United States with no protection against liability for project failures because substantially more money had been spent on other project functions.

The court of appeals here reasonably applied its longstanding test for the availability of immunity under Section 702c in light of the practical realities of the extensive and complex Columbia Basin Project. Its decision presents no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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